



November 6, 2002

**BY HAND DELIVERY**

Christopher Libertelli  
Legal Advisor  
Office of Chairman Michael K. Powell  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

**Re: Ex Parte Presentation in the Matter of Review of CC Docket No. 01-338,  
Review of the Section 251 Unbundling Obligations of Incumbent Local  
Exchange Carriers; and CC Docket No. 96-98, Implementation of the Local  
Competition Provisions of the Telecommunications Act of 1996**

Dear Mr. Libertelli:

This letter responds to Verizon's October 18, 2002 ex parte presentation concerning Verizon's "no facility" policies. A major issue in this proceeding is the extent to which an ILEC may avoid its unbundling obligations by claiming that facilities are not available. The issue has been most starkly presented in the Verizon territories. Carriers have submitted evidence demonstrating that Verizon rejects a substantial percentage of UNE orders on "no facilities" grounds. Allegiance, for example, has informed that Commission that Verizon rejects 20% to 60% of its orders due to a lack of available facilities.<sup>1/</sup> Conversent has submitted evidence that Verizon rejected 37.2% of its DS-1 UNE loop orders in Massachusetts, 46.4% in Rhode Island and New York, and 67.3% in New Jersey.<sup>2/</sup> Carriers have also submitted evidence that the rate of Verizon "no facilities" rejections far exceeds that of other Bell companies.

NewSouth's experience is consistent with this evidence. NewSouth experiences very few "no facilities" rejections from BellSouth. By contrast, NewSouth was receiving so many rejections from Verizon's southern operations that NewSouth has simply stopped submitting DS-1 UNE loop orders with Verizon. Moreover, Verizon has taken actions for which there is no discernable, sound technical basis, but which create the need to undertake construction work. For example, Verizon may serve a small business with multiple lines using an aerial drop for the last segment. When NewSouth seeks to convert such a customer to a DS-1 circuit, Verizon takes the position that it can no longer use the aerial drop, but must use a buried drop. This creates the need for construction, which Verizon then claims it is not required to perform in order to provide

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<sup>1/</sup> Allegiance Sept. 30, 2002 ex parte at 2.

<sup>2/</sup> Conversent Communications, October 23, 2002 ex parte at 4.

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the element as an unbundled DS-1 loop. To the best of NewSouth's knowledge, BellSouth has not taken such a position.

Verizon attempts to justify this disparate treatment by claiming that it only rejects orders that would require it to build a new network element. It argues that Commission precedent only obligates ILECs to unbundle their existing network, not to construct network elements solely for the purpose of unbundling. Verizon also cites the Eighth Circuit's language in *Iowa Utils. Bd.* that "[s]ubsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's *existing* network – not to a yet unbuilt superior one."<sup>3/</sup>

These statements, however, simply beg questions. What constitutes the carrier's existing network for unbundling purposes? Where is the line between, on the one hand, modifying the network to enable CLEC access to network elements, including the full functionality of that element, which the Eighth Circuit upheld, and, on the other, requiring substantial alteration of the network to provide superior quality access.<sup>4/</sup> What is clear is that ILECs themselves cannot be left to answer these questions and thus dictate the parameters of their unbundling requirements. Such discretion not only leads to demonstrably disparate treatment, but also is an invitation to discrimination and anticompetitive conduct, as state commissions have found.<sup>5/</sup> Moreover, acceding to Verizon's position would constitute adoption of worst competitive practices whereas this Commission has always striven to promote the best competitive practices.

State Commissions Have Found that much of the Work Verizon Describes is Normal, Routine Work the Cost of Which Is Already Included In UNE Rates

Verizon has taken advantage of the ambiguity of the current rules to adopt an exceedingly narrow interpretation of its unbundling obligation. It believes, for example, that it is not required to install line cards in existing equipment, or to perform simple cross connects between existing multiplexers and copper or fiber facilities, or to install a network interface device at the customer premises.<sup>6/</sup> Verizon contends such activity constitutes the construction of a superior, unbuilt network. Although Verizon for now agrees to undertake such work, competing carriers should not be required to count on Verizon's largess.

In its October 18<sup>th</sup> submission, Verizon also provides more detail on circumstances in which it will not provide UNE access because it ostensibly involves installing new copper or cabling, equipment or electronics. In an effort to demonstrate that substantial construction work is involved in these circumstances, Verizon describes work such as accessing manholes, splicing cable, using bucket trucks to reach aerial cable, or installing equipment casings.

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<sup>3/</sup> *Iowa Utils. Bd.*, 120 F.3d at 813 (emphasis in original), subsequent history omitted.

<sup>4/</sup> *Iowa Utils. Bd.*, 120 F.3d at n. 33.

<sup>5/</sup> See, e.g., *Illinois Commerce Commission vs. Illinois Bell Telephone Company*, 99-0593, Order, August 15, 2000 at 18-19 (this Order may be found at Attachment 8 to Allegiance September 30, 2002 ex parte); *Michigan Bell Telephone Co. v. Strand and BRE Communications*, 2000 U.S. LEXIS 21402 at \*14 (E.D. Mich. 2000); *Worldcom Technologies, Inc. v. Ameritech Michigan*, 2000 WL 363350 (Mich. P.S.C. March 3, 2000) at \*7.

<sup>6/</sup> Verizon October 18<sup>th</sup> ex parte at 2.

The most striking aspect of Verizon's submission is the extent to which the work it describes is the routine, day-to-day work of managing an ILEC's network. Indeed, state commissions, in orders upheld by the courts, have rejected ILEC arguments that the type of work described by Verizon constitutes the construction of a superior, unbuilt network.<sup>7/</sup> Rather, they have required carriers to provide access to UNEs under the circumstances identified by Verizon because the type of construction work involved constitutes routine, normal work on the ILEC's existing network. In fact, the states have found that UNE rates already include the cost of doing much of this type of work and have rejected ILEC attempts to assess special construction charges finding that such charges would result in double recovery.<sup>8/</sup> If the Commission were to adopt Verizon's position, carriers that have purchased UNEs would in effect be paying rates that are premised on the ILEC performing work that, under Verizon's view, ILECs may refuse to perform.

NewSouth urges the Commission to give substantial weight to these state commission decisions.<sup>9/</sup> The authors of these decisions had the benefit of extensive hearings and are intimately familiar with the management of ILEC networks. NewSouth believes that these decisions can inform the development of a new rule to resolve the current ambiguity over the ILECs unbundling obligations.

The Addition of Capacity When Facilities Have Reached Exhaust or the Installation of Equipment Needed to Derive DS-1 or Higher Signals Does Not Constitute the Construction of A Superior Unbuilt Network

Verizon contends that it need not provide access to UNEs where there are no spare facilities or where equipment must be installed. Verizon argues, for example, that, in the absence of fiber facilities, spare copper facilities must exist before Verizon can provision a DS-1 loop. Verizon states that 12% of its "no facilities" rejections are due to the lack spare copper facilities in these circumstances.<sup>10/</sup>

The states have rejected such arguments and have required ILECs to add capacity, either in the form of additional loops facilities, or the equipment needed for high capacity loops or transport, as long as the request is for facilities within the ILECs' current serving area. The states have been particularly dubious about claims that there are no spare loop facilities. The evidence submitted in state proceedings suggests that lack of spare loops should be "an extremely rare occurrence,"<sup>11/</sup> and that lack of spare facilities suggests inefficient plant management. States have found that the design and installation of additional loop facilities in circumstances where the ILEC claimed that no spare copper was available constitutes routine,

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<sup>7/</sup> See, e.g., *BRE*, 2000 U.S. LEXIS 21402 at \*[22].

<sup>8/</sup> *BRE v. Ameritech Michigan*, 1999 Mich. PSC LEXIS 22 at \*[39], *aff'd*, *BRE* 2000 U.S. LEXIS 21402 (E.D. Mich. 2000).

<sup>9/</sup> NewSouth reviewed many of these decisions in its initial comments. NewSouth Comments at 30-37. See also, *Allegiance* Sept. 30, 2002 ex parte at 6-7.

<sup>10/</sup> Verizon October 18<sup>th</sup> ex parte at 3.

<sup>11/</sup> *Illinois Commerce Commission v. Illinois Bell Telephone*, Attachment 8 to *Allegiance* Sept. 30, 2002 ex parte at 14 (citing staff testimony that "it would be very unusual for a company with the size and resources of Ameritech to run out of loops").

normal work that carriers already have paid for in their UNE rates.<sup>12/</sup> A contrary result would reward, and further encourage, inefficient plant management.<sup>13/</sup>

The states have also rejected arguments that ILECs are not obligated to add equipment necessary to convert an analog loop to a digital DS-1 loop. The Michigan Commission, for example, rejected arguments by Ameritech that converting an analog loop to a digital DS-1 loop constituted construction work it was not required to perform. Like Verizon, Ameritech had maintained that it had no obligation to attach repeaters or other equipment needed to allow high-speed transmission.<sup>14/</sup> The Michigan commission found that such work does not constitute the construction of a new, superior network. Moreover, as the Michigan staff noted, competing carriers pay for the cost of converting to a digital loop through higher monthly charges.<sup>15/</sup> It is NewSouth's experience that DS-1 loop recurring charges are \$70 to \$150 more than analog loop charges, and nonrecurring charges are in the range of \$300 to \$500. Moreover, the conversion of analog to digital DS-1 loops also frees up copper for additional uses. NewSouth's customers typically obtained service from the ILEC over multiple copper loops. NewSouth provides service to these same customers using a single 2-wire or 4-wire DS-1 loop. The remaining copper loops are freed for use by other customers and replenish the spare capacity in the ILEC serving area.

States have also rejected arguments that the 1996 Act does not require ILECs to install equipment where existing bays or slots are exhausted. In *WorldCom Technologies* for example, Ameritech argued, just as Verizon does here, that it was not required to add bays on either end of existing fiber.<sup>16/</sup> Ameritech claimed that the transport facilities cannot be deemed to exist if it must add bays. The Michigan PSC rejected this argument, finding that:

“MCI Worldcom is not seeking access to a superior, unbuilt network, but access to the existing network with a technology that Ameritech Michigan itself uses. MCI WorldCom is not asking Ameritech Michigan to deploy facilities it does not use in providing service or to install facilities along new routes. It is not asking Ameritech Michigan to ‘build’ facilities as that term is used in the industry. The Commission concludes that the [1996 Act] requires Ameritech Michigan to provide transport facilities of the type that are currently in use, even if that requires the installation of additional electronics at either end of the fiber.”<sup>17/</sup>

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<sup>12/</sup> *BRE*, 2000 U.S. LEXIS 21402 at 22.

<sup>13/</sup> *See, Illinois Commerce Commission v. Illinois Bell Telephone*, Attachment 8 to Allegiance September 30, 2002 ex parte at 21.

<sup>14/</sup> *BRE* 2000 U.S. Dist. LEXIS 21402 at \*[10].

<sup>15/</sup> *BRE*, 1999 Mich. PSC LEXIS 22 n. 13.

<sup>16/</sup> *Worldcom Technologies, Inc. v. Ameritech Michigan*, Case No. U-12072, Opinion and Order, 2000 WL 363350 at \*3 (Mich. P.S.C. March 3, 2000); *aff'd*, *Michigan Bell Telephone v. Worldcom Technologies*, 2002 WL 99739 (Mich. App. 2002) (unpublished opinion). Ameritech argued that when a central office bay is used to capacity it may reject an order for unbundled transport because if it must add electronics, the facilities do not exist as required by the FCC's orders.

<sup>17/</sup> *Worldcom Technologies*, 2000 WL 363350 at \* 6.

The Washington State commission reached similar conclusions. It held that Qwest must construct new facilities to any location currently served by Qwest when similar facilities to those locations have exhausted. In cases where capacity is limited or at exhaust, Qwest is required to either light additional fiber or change electronics to provide additional capacity in the same manner it would provide additional capacity for its own use. Finally, it held that if a requesting carrier is located inside of Qwest's current point-to-point service area, Qwest is required to build facilities and provide electronics at the competing carrier's wire center, if requested.<sup>18/</sup>

#### State Definitions of Available Facilities and Existing Networks Refer to Existing Service Areas

A common theme among the several state commissions that have reviewed these issues is the adoption of a definition for existing facilities or available facilities that focuses on the carrier's existing service area. The Illinois Commission thus held that "a facility is available if it is located in the area presently served by" the ILEC.<sup>19/</sup> Similarly, the Michigan Commission found that a loop is unavailable if it is located in an area not presently served by Ameritech Michigan, not when the area is served, but the order requires a field dispatch.<sup>20/</sup> More expansively, the Washington State Commission held that:

"[T]he incumbent LEC's 'existing' network includes all points that it currently serves via interoffice facilities, and it is not required to extend its network to new points, based on competitors' requests. However, the incumbent LEC is still required to provide access to UNEs within its existing network even if it must construct additional capacity within its network to make UNEs available to competitors. Qwest implies that the term 'existing network' only applies to the actual facilities that are in place, when in fact existing network applies to the 'area' (end offices, serving wire centers, tandem switches, interexchange carrier points of presence, etc.) that Qwest's interoffice facilities serve. This same concept applies to the loop side of Qwest's network where Qwest is obligated to construct additional loops to reach customers' premises whenever local facilities have reached exhaust."<sup>21/</sup>

The rationale for adopting a definition of existing network or availability that focuses on the ILECs present serving area was stated by the Court in *BRE*:

"The MPSC found that Ameritech had existing facilities in the areas that BRE requested access to the unbundled loops. The record before the MPSC showed that Ameritech's network consist [sic] of specific boundaries that are established for each distribution area and those distribution facilities are designed to 'serve the ultimate service demand' with that defined area. Finally, the MPSC found that 'it is unreasonable for Ameritech [ ] to suggest that a network constructed on the basis of long run, forward looking costs would

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<sup>18/</sup> *In Re U.S. West Comm.*, Docket Nos. UT-003022, 003040, 2001 WL 1672340 at \*10-15, \*23/(Wash. U.T.C.) (July 24, 2001).

<sup>19/</sup> *Illinois Commerce Commission v. Illinois Bell Telephone*, Attachment 8 to Allegiance, Sept. 30, 2002 ex parte at 21.

<sup>20/</sup> *Michigan Bell Telephone v. John G. Strand & BRE Comm.*, 2000 U.S. Dist. Lexis 21402 (E.D. Mich. 2000).

<sup>21/</sup> *Re US West Comm. Inc.*, 2001 WL 1672340 \* 12 (Wash. U.T.C)

not have sufficient spare capacity to permit the provisioning of unbundled loops as normal, routine work.’ The Court affirms the MPSC’s decision that since Ameritech has an existing network of unbundled loops that can be used for unbundled loop access, it must provide BRE with access and make the unbundled loops ‘available’ even if additional engineering and construction are necessary.”<sup>22/</sup>

Defining “existing network” with respect to the network facilities broadly available within a serving area promotes certainty and reduces the possibility of discrimination. The ILECs’ proposed definitions that focus on the extent to which the particular facility requested is fully connected between the desired end points and all necessary equipment either physically installed or readily installable results in carriers having little certainty in advance that their order will be accepted. Moreover, it is extremely difficult to confirm the ILEC’s proffer that facilities are exhausted or non-existent. Unlike collocation space exhaustion, which at least can be confirmed by inspection, there is virtually no ability on the part of requesting carriers to verify ILEC claims that facilities do not exist. ILECs can utilize this lack of transparency to their advantage to thwart or hamper competitive entry.

Finally, Verizon’s policy limits the ability of competing carriers to upgrade existing services to customers. Under Verizon’s policy, carriers such as NewSouth would be limited to providing integrated services, including broadband services, over DS-1 loops to customers which already received a DS-1 circuit from the ILEC. Carriers would not be able to convert analog to digital services as NewSouth routinely does for its customers. The effect would be to reduce the deployment of broadband services, especially to a class of customer that the ILECs largely have ignored.

#### Proposed “No Facilities” Rule

In light of the foregoing, NewSouth proposes that the Commission follow the states and adopt a definition of facility availability that is related to the ILECs’ serving area. Specifically, NewSouth proposes the following “no facilities” rule:

#### 51.307(f)

An incumbent LEC shall provide access to unbundled network elements to the extent that such network element is available. For purposes of this section, an unbundled network element shall be deemed available if located in an area served by the incumbent LEC at the time that the requesting carrier requests unbundled access.

- (i) A network element shall be deemed available in all situations where the incumbent LEC must add equipment, to the extent such equipment is customarily employed by the incumbent LEC, or undertake modifications to its network, necessary to provide access the network element requested. Such equipment or modifications shall include, but not be limited to, racks, apparatus cases, multiplexers, line cards, tie cables, repeaters, doublers, regenerators, range

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<sup>22/</sup> *BRE*, 2000 U.S. Dist. LEXIS at \*[21].

extenders, network interface devices such as smart jacks or chassis, or the installation of a drop, whether such equipment is located at a central office, wire center, remote terminal or customer premises.

- (ii) An incumbent LEC shall make modifications to its network necessary to provide access to unbundled network elements, including the features, functions and capabilities of such elements, to the same extent that the incumbent LEC would undertake such modification, without additional charge, in order to provide service to its wholesale or retail customer.
- (iii) An incumbent LEC shall not be required to extend its network to points outside of its service area in order to provide access to a requested unbundled network element.

Very truly yours,

/s/

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Page 8

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